

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

Nos. 77-4057, et al

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, *Respondents,*

MCI TELECOMMUNICATIONS CORP., ET AL., *Intervenors.*

On Petition for Review of Orders of the
Federal Communications Commission

BRIEF FOR THE PETITIONER
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

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**On Petition for Review of Orders of the
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**BRIEF FOR THE PETITIONER
AMERICAN TELEPHONE AND TELEGRAPH COMPANY**

ISSUES PRESENTED *

1. Whether the Federal Communications Commission erred in ordering the elimination of existing tariff restrictions on sharing and resale of private line telecommunications services when, as this Court has previously ruled, such orders necessarily constitute a prescription of practices and rates, and where, contrary to the requirements of the Communications Act, the Commission has

* No. 77-4057 has previously been before this Court in connection with a motion to stay the effectiveness of the orders under review. The Court has granted motions to dismiss made by the petitioners in three other cases (Nos. 76-4190, 76-4201 and 76-4237) involving review of the same orders. The six cases included in the caption were consolidated by the Court, and an expedited briefing and argument schedule was established.

not conducted a hearing to resolve disputed questions of material fact and has not made a reasoned finding that the practices and rates it has prescribed are fair, just, and reasonable.

2. Whether the Commission erred in finding that the elimination of existing tariff restrictions on sharing and resale will result in greater public benefits than public losses and injuries where the only pertinent factual evidence before it indicated that such losses and injuries will substantially exceed any asserted benefits, and where it failed to conduct an evidentiary hearing or to take any other steps to assess adequately the far-reaching consequences of its orders.

3. Whether the Commission's orders are arbitrary, capricious and without reasoned support because it did not (and could not, on the basis of the record before it) rationally determine whether the elimination of long-established restrictions on resale and sharing is just, fair, and reasonable, and did not rationally weigh the actual disadvantages of the elimination of those restrictions against the asserted advantages.

STATEMENT OF THE CASE

Telecommunications common carriers have, for over a century, included provisions in their tariffs restricting resale and third party use of communications services. Throughout this period, it has been understood that resale and sharing of such services would undermine the carriers' rate structure, cause increased rates to many categories of other subscribers, and impede efficient regulation. Without restrictions on resale and third party use of services, layers of intermediaries would be created between common carriers and the ultimate users of their services. It has been thought that the existence of such intermediaries would hamper both effective regulation and the provision of efficient telecommunications services, all to the detriment of the general public.

On these and other grounds, courts and regulatory agencies have regularly sustained restrictions on resale and sharing as just and reasonable.¹ It has repeatedly been held that any effort by telephone companies to furnish a significant portion of their services to resellers on a wholesale basis, such as the Commission's orders would now require, would be contrary to law.² The Commission itself has, with a single exception, permitted restrictions on resale and sharing to remain undisturbed since its creation.³

1. Proceedings before the Commission.

The orders under review here arise from a proceeding initiated by the Federal Communications Commission in 1974 by a Notice of Inquiry and Proposed Rule Making. 47 F.C.C. 2d 644 (1974) (App. at 12.) The Notice provided for three rounds of written comments addressed to

¹ Tariff provisions similar to those found unlawful by the Commission's decision here were upheld by the Interstate Commerce Commission when it had jurisdiction over communications common carriers. *Private Wire Contracts*, 50 I.C.C. 731 (1918). See also, *Johnson v. Mountain States Telephone and Telegraph Co.*, 159 P. 526 (Utah 1916); *Clerf v. Bell Telephone Company of Pennsylvania*, 44 P.U.R. (n.s.) 74 (Pa. Pub. Serv. Comm'n 1942); *Building Industries Exhibit v. Public Utilities Comm'n*, 80 N.E.2d 836 (Ohio 1948); *Gelsam Realty Co. v. New York Tel. Co.*, P.U.R. 1929A, 224 (N.Y. Pub. Serv. Comm'n 1928); *1015 Chestnut Street Corp. v. Bell Tel. Co. of Pa.*, P.U.R. 1931A, 19 (Pa. Pub. Serv. Comm'n 1930).

² See, e.g., *Williams and Calmer, Inc. v. Southwestern Bell Tel. Co.*, 70 P.U.R. (n.s.) 35, 42 (Mo. Pub. Serv. Comm'n 1947); *People v. New York Telephone Co.*, 174 Misc. 128, 130; 22 N.Y.S.2d 837, 839 (Supp. Ct. Albany Co. 1940), *aff'd*, 262 App. Div. 440, 29 N.Y.S. 2d 513 (3d Dep't 1941), *aff'd*, 40 N.E. 2d 1020 (1942).

³ On a previous occasion, the Commission sought to overturn sharing restrictions regarding a particular private line service. In 1970, the Commission attempted, on the basis of the same procedural shortcuts that were used here, to prescribe unlimited sharing of Telpak, a bulk private line telecommunications service offered by AT&T. This Court, in an opinion that is controlling here, sustained a finding of discrimination but held that the Commission's prescription of rates and practices was unlawful because of its failure to comply with the requirements of Section 205(a) of the Communications Act. *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

the broad issue of whether resale and sharing of private line telecommunications services should be permitted, and, if they should, whether and to what extent the Commission should regulate those activities. The Notice did not contain specific proposals for possible changes in existing requirements, or state with precision what action the Commission sought to take with regard to particular telecommunications services or tariffs. Instead, Paragraph 40 of the Notice indicated that a First Report and Order would be issued before the Commission made any final determinations, and suggested that oral hearings would be held if "necessary or appropriate." (App. at 27.) If the Commission had in fact adhered to its announced program, such procedures would have enabled the parties to respond to specific regulatory proposals and facilitated the resolution of the complex factual questions raised by the Commission's new requirements.

In response to the Notice, the Commission received comments from 43 parties. With only two exceptions, none of those parties advocated the extreme action of unlimited resale and sharing of private line services which was ultimately adopted in the Commission's Report and Order, although varying degrees of limitation were proposed by some of the parties. The two exceptions were the Office of Telecommunications Policy ("OTP")⁴ and Orlando Communications Club, Inc. ("Orlando"). The Commission's Report and Order did not refer to the com-

⁴ Significant doubt exists as to whether the OTP submission had any proper role in the proceeding at all. It was submitted some two and one-half months after the date for filing comments had passed. Although the accompanying transmittal letter suggested that OTP would be "pleased" to have the comments included in the public record, no order placing them in the record was ever adopted by the Commission. The Commission sought in its Memorandum Opinion and Order upon reconsideration (at n.13) to justify its reliance upon OTP's belated submission with the claim that it treated that submission as "reply comments." (App. at 162.) It is significant, however, that the Commission has evidently never entered such an order and that it did not, until some six months after the Report and Order was released, explain that it had adopted such an artifice.

ments submitted by Orlando, and apparently relied virtually exclusively upon the OTP submission.

Even OTP acknowledged that unlimited resale and sharing of private line services could result in adverse consequences for carriers and the public. It recognized that residential telephone subscribers might be detrimentally affected by increased long distance and local exchange rates. (App. at 1126, 1128). It conceded that deaveraging of interstate toll rates could result, and that the adverse impact on interstate rates may be aggravated by customer shifts from ordinary long distance service to private line services. (App. 1126, 1128-29.) OTP sought to discount these and other disadvantages with conclusory assurances that "[i]n the main" they are of "relatively minor" significance. (App. at 1142.) Despite those assurances, OTP was compelled to acknowledge that it did not know "the scale and direction of possible impacts" that might result. (App. at 1121.)

The comments submitted by AT&T did not oppose a careful review of existing restrictions upon resale and sharing to determine whether specific changes in those restrictions might be appropriate. (App. at 278-79.) AT&T emphasized, however, that a hasty and indiscriminate abolition of all such limitations "would produce severe and unfavorable consequences for both carriers and the public. AT&T pointed out that a radical alteration of existing policies would drastically affect the entire industry. It would have important implications for the provision of all telecommunications services, undermine the rate structure for such services, and ultimately result in increased charges for residential telephone subscribers and other members of the public. (App. at 257-78.)

AT&T's comments demonstrated that the elimination of restrictions upon resale and sharing would create layers of middlemen interposed between carriers and the ultimate users of the carriers' services. (App. at 275-77, 1304-06.) The activities of those middlemen would impede

the efficient provision of services to users, and significantly increase the administrative burdens imposed on AT&T and other carriers. The underlying carriers, who would continue to be ultimately responsible for providing the basic communications facilities used by all customers, would find it substantially more difficult to forecast and provide for future needs and requirements. (*Id.*)

AT&T's submission included the results of an economic impact study which showed the serious disadvantages of any radical alteration in the Commission's previous requirements. (AT&T Comments, Attachment No. 1) (App. at 287.) It was the only economic analysis of the consequences of such changes contained in the record before the Commission. Since the Commission's Notice was generally applicable to any and all private line services, AT&T's study necessarily assumed that all such services might be subject to any new requirements that might be imposed by the Commission. It included conservative estimates of the costs and injuries that would result from such new requirements, calculated on the basis of actual data and methods that had proved reliable in previous studies. The study found that unrestricted resale and sharing of all of AT&T's interstate private line services would cause foreseeable net revenue losses for AT&T's long distance and other services of approximately \$178 million over a two-year period.

AT&T's submissions showed that resale and sharing would cause numerous business customers to shift from long distance and Wide Area Telephone Service ("WATS") to shared or resold private line services. The rates paid by those customers would, as a result of the shifts, be significantly different from their existing rates. Although many of the customers would shift from one AT&T service to another, AT&T's total net revenues would be substantially reduced. Increased rates for other users of long distance and WATS services may follow. Since the calls diverted to shared and resold private line

services would probably not occur uniformly throughout the nation, but would instead be concentrated in major urban areas, a deaveraging of national interstate rates might result. The long-standing national policy favoring the uniform averaging of rates throughout the continental United States would be undermined or destroyed. Under existing rules for the allocation of revenues between the interstate and intrastate segments of telephone calls, a significant portion of the increased rates that would be caused by the diverted calls would be imposed upon users of intrastate services, including residential telephone subscribers. (App. at 257-78, 1165-66.)

AT&T emphasized that, at a minimum, such far-reaching changes should not be permitted to occur without further proceedings, in which the implications of those changes could be thoroughly evaluated on the basis of an adequate factual record.⁵ Nonetheless, despite the assurance in the Commission's Notice that an interim report would be issued before any final determinations were made, the Commission unaccountably announced in the Report and Order that it would not conduct any further proceedings. No opportunity was afforded the parties for an evidentiary hearing, in which the numerous factual questions created by the Commission's novel requirements could be realistically resolved. No proceeding was held in which specific proposals for change could be addressed, or in which the economic consequences of resale and sharing could be meaningfully evaluated. Instead, the Commission merely terminated the proceedings, and adopted the final Report and Order that is under review here.

⁵ AT&T Response at paras. 2, 43-47, 49-50; Reply at para. 6. (App. at 1290, 1317-20, 1160-61.) Numerous other parties also requested the Commission to conduct further proceedings, or at least not to adopt a policy of extensive resale and sharing without such proceedings. *E.g.*, Responses of ARINC, paras. 34-48, 52 (App. at 1350-57); Tymshare, para. 10; Bunker Ramo, para. 11; ADAPSO, paras. 4, 9-10, 13; CBEMA, paras. 5-7; CITICORP, paras. 7, 14; GTE, para. 11A-C; MCI, paras. 9, 10, 52; ITT Worldcom, p. 1.

2. The Commission's Report and Order.

The Report and Order ("R. & O.") (App. at 28) declares, for the first time in the Commission's history, that *all* existing restrictions upon sharing and resale of private line communications services are unjust and unreasonable. The Commission⁶ found that existing tariff provisions permit selective sharing and resale, and, without meaningful analysis of any specific restriction, jumped to the conclusion that every such restriction must therefore be in violation of the Communications Act. It reached this result by disregarding a lengthy and unbroken series of decisions by courts and regulatory agencies that sustained limitations upon sharing and resale, and by relying instead upon cases involving transportation freight forwarding. (R. & O. at para. 41) (App. at 59.) Even the the Commission was compelled to concede, however, that freight forwarding and sharing of telecommunications services "may not be completely analogous. . . ." (*Id.* at n.63) (App. at 59.)

The Commission described a series of important changes in the telecommunications industry that it expected to occur as a result of its orders. The Commission stated that it anticipated the development of two "tiers" of telecommunications carriers—the existing carriers, which were expected to offer "basic communications channels and switching services" at least partly on a "wholesale" basis to resellers, and an entirely new class of firms which would act as middlemen to resell those services to others. (R. & O. at paras. 81-84) (App. at 80-81.) The Commission anticipated that the activities of this new "tier" of firms would produce significant changes in the rate structures of existing carriers. (*Id.* at paras. 75-76, 81-86) (App. at 78, 80-82.) It predicted that "novel" services would be developed. (*Id.* at para.

⁶ Separate statements were prepared by Commissioners Hooks, Lee and Robinson. (App. at 141-48.)

106) (App. at 95.) It foresaw a new "information handling" industry, consisting of firms engaged in resale, specialized carrier and data processing activities. (*Id.* at para. 84) (App. at 81.) It stated that the new "tier" of resellers would be subject to "open entry," under which those firms would not be required to satisfy all of the obligations for certification imposed by Title II of the Act. (*Id.* at paras. 102-105) (App. at 93-95.)

Despite these far-reaching changes, the Commission did not trouble to demand "detailed proof" of the asserted advantages of its new requirements. (*Id.* at para. 88) (App. at 83.) It was content merely to assume that OTP's conclusory assurances would prove to be accurate. Correspondingly, the Commission attempted, without determining the revenue impact of its orders (*id.* at para. 49) (App. at 64-65), to discount the evidence offered by AT&T and others of the severe economic consequences of sharing and resale. Although the Commission did not dispute AT&T's showing that a complete and precise economic impact study would require more time than the Commission had permitted, it announced in vague and conclusory terms that the study submitted by AT&T was "methodologically defective." (*Id.* at para. 58) (App. at 68.) It stated that the assumptions made in AT&T's study regarding customer behavior were not adequately supported, but did not refer to any specific evidence that was contrary to those assumptions, or indicate any of the assumptions upon which its own conclusions were based.

The Commission condemned Western Union for failing to prepare an economic study of the impact of sharing and resale. (*Id.* at para. 72) (App. at 75-76.) Western Union had described the difficulties of preparing a full economic study without meaningful guidance from the Commission as to the precise changes it was considering. The Commission denied that any such problem existed, and stated that Western Union should have conducted a study on the basis of assumptions as to relevant matters.

With respect to AT&T, the Commission evidently believed that sharing and resale could be ordered because AT&T's economic study was based on assumptions, while, with respect to Western Union, it held that such sharing could be ordered because a study based upon assumptions had not been conducted.

In addition, the Commission claimed that the results of AT&T's study were inapplicable because it had decided, after the study had been submitted, to omit WATS from the scope of its orders in this proceeding.⁷ Nonetheless, the Commission did not afford AT&T an opportunity either to demonstrate the study's continued significance or to revise it in light of the Commission's subsequent announcements. Nor did the Commission provide its own analysis of the economic consequences of its orders, or refer to any specific evidence in the record that was inconsistent with the findings of AT&T's study. To the contrary, the Commission claimed that it was not required even to determine "the exact revenue impact" of its orders. (R. & O. at para. 49) (App. at 64-65.)

In a separate statement, Commissioner Hooks expressed serious doubts regarding the reasonableness of the Commission's orders. (App. at 142-43.) He emphasized that the Commission had rejected AT&T's cost study without providing even "a scintilla of economic data" to buttress its own "theorems." He recognized that the Commission's actions may result in the termination of useful classes of service, and expressed fears that the "cumulative effect" of the Commission's actions "may

⁷ The Commission also claimed that AT&T's study was no longer valid because it had decided in a separate proceeding, completed after the study was made and submitted, to order the termination of Telpak, a bulk private line service offered by AT&T. The Commission made clear, however, that Telpak was subject to unlimited sharing and resale during any periods that it continued to be available. (R. & O. at para. 49) (App. at 64-65.) Nothing in the Commission's original Notice suggested that the submissions made by AT&T in this proceeding should disregard the impact of resale and sharing of private line services upon WATS, Telpak or any other service.

be unwise." He stated that he was particularly uneasy because of the Commission's reliance upon policies derived from the seriously disabled railroad industry.

3. Commission proceedings since the Report and Order.

On August 1, 1976, AT&T filed with the Commission a motion to stay the effectiveness of the Report and Order. On August 25, 1976, AT&T filed a petition for reconsideration of the orders. Numerous other parties to the proceeding also filed timely requests for similar relief.

AT&T's motion for a stay reiterated that important disadvantages and costs will result from unlimited resale and sharing. It emphasized that important factual questions exist here regarding the revenue impact of the orders, the consequences of the creation of a new "tier" of middlemen, the implications of the orders for the rate structure of long distance and other services, and other significant matters. The motion pointed out that in such situations Section 205(a) of the Act permits the Commission to prescribe practices and rates only if it has first afforded a full opportunity for a hearing in which contested factual issues may be carefully investigated and resolved.

AT&T's petition for reconsideration, together with similar requests for relief by numerous other parties, showed that the Commission's orders are so vague and indefinite that their implementation will result in confusion and uncertainty.⁸ The petition emphasized that unless the meaning of the terms upon which the orders are based is clarified, any efforts to implement the orders "will cause chaos in the industry." (App. at 1467.) The

⁸ For example, AT&T's petition showed that the terminology of the orders is ambiguous and inconsistent, resulting in uncertainty and conflicting interpretations (at Subpart E), that the imprecision of the orders may hamper the provision of video services for television networks and other users, and that in numerous other respects the orders are vague and indefinite. (App. at 1489, 1504-07.)

petition identified four specific issues that urgently require clarification or change, and described numerous other deficiencies that warrant reconsideration of the orders in their entirety.

On September 14, 1976, the Commission released a Memorandum Opinion and Order which stated that the numerous requests for relief would be acted upon "at a later date." The Memorandum Opinion recognized that there are "varied interpretations" of the provisions of the Report and Order, and stated that "[u]nder such circumstances" the "public interest" would be served by an extension of the time in which revised tariffs are required to be filed. (App. at 149-50.) The Commission ordered that the time for filing tariffs eliminating restrictions on resale and sharing be extended to December 15, 1976. (App. at 150.)

On December 3, 1976, the Chief of the Commission's Common Carrier Bureau, acting pursuant to authority delegated by the Commission, delayed the effectiveness of the Report and Order for a second time. The order provided that the time for filing revised tariffs be extended to January 17, 1977. (App. at 151.)

On January 12, 1977, the Commission released a Memorandum Opinion and Order which, apart from two alterations of collateral matters, denied the petitions for reconsideration and reaffirmed the principal provisions of the Report and Order. (App. at 152.)⁹ The Commission stated that it would not require the creation by carriers of a separate subsidiary to conduct resale activities, and would postpone until a separate proceeding any consideration of sharing and resale of international communications services. With those exceptions, the Memorandum Opinion

⁹ The Commission's January 12 Memorandum Opinion did not purport to dispose of the pending motions to stay the effectiveness of the Report and Order, but instead appeared to assume that those motions had been acted upon in its Memorandum Opinion released on September 14, 1976.

did little more than reiterate the vague and conclusory findings of the Report and Order. It disregarded or failed to clarify some of the important areas of ambiguity that had been identified in AT&T's petition for reconsideration. The Commission ordered that revised tariffs be filed by March 18, 1977, to be effective 90 days later.¹⁰

On February 14, 1977, AT&T filed with the Commission a motion to stay pending judicial review the effectiveness of the Report and Order as modified upon reconsideration.¹¹ AT&T's motion emphasized that the January 12 Memorandum Opinion had not eliminated or even ameliorated the serious disadvantages and injuries that will result from the Commission's new requirements. The motion and supporting affidavit made clear that implementation of the orders prior to judicial review will adversely affect the public and result in foreseeable injuries to AT&T at a rate of at least \$80 million annually.

On March 14, 1977, the Commission released a Memorandum Opinion and Order that denied AT&T's motion for stay. The Commission denied that it had previously acknowledged that its orders would result in a radical restructuring of the telecommunications industry. It discounted the significance of the losses and injuries immediately threatened to AT&T as a result of the orders, although it conceded that AT&T will suffer "some" expense and inconvenience. (App. at 175.) The Commission stated that it had statutory authority to suspend the effectiveness of the revised tariffs for an even longer period than had been provided for in its January 12 Memorandum Opin-

¹⁰ In connection with AT&T's motion to this Court for a stay pending judicial review, described *infra* at 14, the Commission issued a Memorandum Opinion and Order, released on March 10, 1977, which delayed the time for filing tariffs until March 23, 1977.

¹¹ In the alternative, AT&T urged that, at a minimum, the orders should be stayed insofar as they may relate to Telpak, a bulk private line service offered by AT&T, until the validity has been finally determined of an order issued by the Commission in a separate proceeding requiring the termination of Telpak.

ion, but it did not order a suspension or indicate in any way that any such delay might in fact ever be granted.

4. Proceedings before this Court.

On March 7, 1977, AT&T moved this Court for a stay of the Commission's orders pending judicial review. The motion and supporting affidavit emphasized that the Commission's orders will result in substantial irreparable injuries and far-reaching changes in the telecommunications industry. It showed that such injuries and changes should not be permitted to occur before this Court had an opportunity to determine the validity of the orders. In response, the Commission conceded that its orders constituted a prescription within the meaning of Section 205(a) of the Communications Act, but argued principally that injunctive relief was not necessary because no significant actions would have to be taken by AT&T prior to the effective date of the tariffs on June 21, 1977. On March 22, 1977, a panel acting on behalf of this Court denied a stay.¹²

SUMMARY OF ARGUMENT

Limitations upon sharing and resale have been adhered to by telecommunications common carriers and regulatory agencies for more than a century. (*Supra* at 2-3.) Courts and regulatory agencies have repeatedly recognized that such limitations are fully consistent with the basic public policy to make communications services available on an economical and efficient basis.¹³ In several instances, they have expressly declared that the elimination of such limitations would be unlawful.¹⁴ Despite these well-established principles, and although not a single carrier and only one

¹² The panel consisted of Judge Meskill of this Court, Judge Motley of the District Court, and Judge Markey of the Court of Customs and Patent Appeals.

¹³ Illustrative cases are listed above, at note 1.

¹⁴ Illustrative cases are listed above, at note 2.

customer party to this proceeding ever advocated such a conclusion, the Commission has, for the first time in its history, declared *all* existing tariff limitations on sharing and resale of private line services to be unlawful.

Although the Commission's orders are limited to private line communications systems, their consequences will be far wider. They constitute a prescription of practices and rates that will cause far-reaching changes in the structure and character of the telecommunications industry. The Commission itself has predicted that "novel" services, a new "tier" of middlemen, and a new "information handling" industry will develop as a result of the orders. Those and other important changes raise factual questions which were not meaningfully investigated or evaluated by the Commission. To the contrary, the Commission acted on the basis of an inadequate record, without conducting an evidentiary hearing, and without taking any other steps that might have permitted it to resolve the complex factual matters involved here. The Commission disregarded the only specific factual analysis before it of the serious disadvantages and costs of resale and sharing, and yet made no independent effort of its own to assess or quantify those disadvantages and costs.

The Commission's orders were adopted on the basis of procedures that fall far short of the requirements of the Communications Act. This Court has on three occasions in the past six years declared that the procedural shortcuts used here by the Commission are impermissible under the controlling provision of the Act.¹⁵ The Court made clear that the full hearing requirement of Section 205(a) of the Act cannot be satisfied merely by the use of informal Notice and Comment procedures, such as the Commission utilized here. The Commission's refusal to adhere to the procedures commanded by the Act and this Court,

¹⁵ AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971); National Ass'n of Motor Bus Owners v. FCC, 460 F.2d 561 (2d Cir. 1972); AT&T v. FCC, 487 F.2d 864 (2d Cir. 1973).

its omission of reasoned findings, and its failure to give rational consideration to the far-reaching consequences of its orders, all constitute independent grounds that require those orders to be set aside.

ARGUMENT

I.

THE COMMISSION'S PRESCRIPTION OF PRACTICES AND RATES WITHOUT A HEARING TO RESOLVE DISPUTED FACTUAL ISSUES IS CONTRARY TO THE REQUIREMENTS OF SECTION 205(a) OF THE COMMUNICATIONS ACT.

The Commission's authority to prescribe practices and rates is derived from Section 205(a) of the Communications Act.¹⁶ Section 205(a) provides that, when significant questions of disputed fact are presented, the Commission may prescribe practices and rates only if it first affords a "full opportunity for hearing."¹⁷ It has been held by the Supreme Court, by this Court, and by the Commission itself that procedures similar to those employed by the Commission cannot, in circumstances such as those presented here, satisfy the full hearing requirement of Section 205(a).

There can be no doubt that the Commission has here made a prescription of practices and rates within the meaning of Section 205(a). As we show below, the purposes and effect of these orders are identical to those of

¹⁶ Section 205(a) provides in relevant part as follows:

"Whenever, after full opportunity for hearing, . . . the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum charge or charges to be thereafter observed, and what classification, regulation or practice is or will be just, fair, and reasonable, to be thereafter followed. . . ."

¹⁷ A second express requirement of Section 205(a), that the Commission make reasoned findings that the rates and practices it has prescribed are just, fair, and reasonable, was also violated by the Commission. See below, at pages 39-42.

a prior sharing order regarding one of the private line services involved here, which was unequivocally held by this Court to constitute such a prescription of both practices and rates.¹⁸ In addition, the Report and Order explicitly described the Commission's requirement of sharing and resale of private line services as a prescription. (R. & O. at para. 40) (App. at 58.) Indeed, in its memorandum to this Court in opposition to AT&T's motion for stay, the Commission itself expressly concedes that its orders constitute a prescription of practices under Section 205(a).¹⁹

The precise issue presented here has already been resolved by this Court. In *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971), the Court considered the validity of an order issued by the Commission which, exactly as these orders have sought to do, prohibited restrictions upon the sharing of Telpak, a bulk private line service offered by AT&T.²⁰ In that case, as here, the Commission had not conducted a hearing to consider disputed factual questions regarding its prescription,²¹ and had not made a reasoned finding that the practices and rates it had pre-

¹⁸ *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

¹⁹ At 15. The Commission denied that it has prescribed rates, but, as we show below, that claim is plainly mistaken. *Infra* at 39-41.

²⁰ The Commission has made clear that Telpak is one of the private line services which are subject to the resale and sharing requirements of the Commission's present orders. (R. & O. at para. 49) (App. at 64-65.) Indeed, this entire proceeding was evidently motivated, at least in large part, by claims filed by American Trucking Associations regarding the resale and sharing provisions of AT&T's Telpak tariff. (Notice, at para. 14) (App. at 17.) The origins of this proceeding provide strong evidence that, in large part, it constitutes a duplication, on a broader scale, of the first Telpak sharing case.

²¹ A hearing was conducted regarding an alleged discrimination under Section 202 of the Act, but it did not, as the Commission's own staff conceded, result in an adequate factual record regarding the prescription. 449 F.2d at 450-51. In 1972, this Court, in an opinion joined by one of the members of the panel in the Telpak case, expressly stated that one of the deficiencies of the Telpak sharing order was the Commission's failure to conduct an evidentiary hearing in accordance with the requirements of Section 205(a). *National Ass'n of Motor Bus Owners v. FCC*, 460 F.2d 561, 564 (2d Cir. 1972).

scribed were just, fair, and reasonable. The Court set aside the Commission's order, and held that a prohibition of sharing restrictions constitutes a prescription of practices and rates. In the Telpak sharing case, as well as in two subsequent decisions,²² this Court emphasized that where disputed factual issues exist, a prescription of practices or rates can be validly ordered only if the Commission has first conducted evidentiary hearings and complied with the finding requirements of Section 205(a).

The principles established in those three cases should be applied here. *A fortiori*, if the Commission could not employ procedural shortcuts to prescribe sharing with respect to Telpak, it cannot utilize the same shortcuts here to prescribe the same practices with respect to both Telpak and other services. We show below that the result reached by this Court with respect to the Telpak sharing order is fully supported by other authorities, the well-settled interpretation of the statutory provision upon which Section 205(a) was modeled, and the special character of Section 205(a) itself. None of the justifications offered by the Commission for disregarding the requirements of Section 205(a) and the instructions of this Court provides any proper basis for the Commission's action.

A. An Evidentiary Hearing Is Essential in Similar Situations Under the Statutory Provision upon Which Section 205(a) Was Modeled.

The Commission properly acknowledged in the Report and Order that the Communications Act was "largely modeled" on the Interstate Commerce Act, "apparently to take advantage of the established body of law construing the latter statute." (R. & O. at Appendix D, para. 6) (App. at 123.) Accordingly, in determining the form of proceeding that is necessary to satisfy Section 205(a),

²² National Ass'n of Motor Bus Owners v. FCC, *supra*, 460 F.2d at 564; AT&T v. FCC, *supra*, 487 F.2d 864.

the construction given to its predecessor section, Section 15(1) of the Interstate Commerce Act, is persuasive. In construing Section 15(1), the Supreme Court has stated unequivocally that, where contested matters of fact are presented, an evidentiary hearing is required. The Court emphasized that in such situations

" . . . the Commission cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding" *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 93-94 (1913).²³

The Commission has sought to avoid the application of *Louisville & Nashville R.R. Co.* here by reliance upon *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973). The claim is without merit. The Supreme Court in *Florida East Coast* was not concerned with the interpretation of Section 15(1), upon which Section 205(a) of the Communication Act was modeled,²⁴ but instead with the nature of the hearing required under the very different provisions of Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a). As the Supreme Court had previously made clear, Section 1(14)(a) was enacted in 1917 to enable the Interstate Commerce

²³ The Supreme Court in *Morgan v. United States*, 298 U.S. 468 (1936), also considered the meaning of the term "full hearing" in a situation where disputed issues of material fact were presented. Chief Justice Hughes inquired, "What is the essential quality of the proceeding under review, and what is the nature of the hearing which the statute prescribes." He responded that the "requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts." *Id.* at 479, 480.

²⁴ S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934).

Commission to remedy specific problems that arose from a particular crisis—an acute shortage of railway freight cars that was experienced during World War I. *United States v. Allegheny-Ludlum Steel*, 406 U.S. 742, 744 (1972).

The Court in *Florida East Coast* expressly recognized that the term "hearing" may have a "host of meanings," 410 U.S. at 239, and made no effort to provide precise or talismanic standards for determining the proper meaning in every case. Its attention was focused exclusively on the special character and particular legislative history of Section 1(14)(a), and it held merely that "in some circumstances" a hearing provision may be satisfied by Notice and Comment procedures. *Id.* at 241 (emphasis added).²⁵ Whatever may be the significance of *Florida East Coast* in other situations, it provides no justification here for disregarding the very different requirements of Section 205(a).²⁶ To the contrary, consistent with the long-standing interpretation that has been given to Section 15(1) of the Interstate Commerce Act, full eviden-

²⁵ It should be observed that the I.C.C. has adopted special procedures even under Section 1(14)(a) to assure a full evaluation of material factual questions, including the submission of verified questionnaires to the Commission, publication of verified data summaries, and the conduct of a hearing with cross-examination. *Adequacy of Freight Car Ownership*, 336 I.C.C. 264 (1969).

²⁶ There are other important differences between this case and *Florida East Coast*. The Supreme Court carefully noted that Section 1(14)(a) did not require a "full" hearing, unlike the statute involved in *Morgan v. United States*, *supra*. In contrast, it is significant that Section 205(a), similar to the statute in *Morgan*, refers to a "full" opportunity for hearing. Moreover, the Court in *Florida East Coast* emphasized that the I.C.C. there had issued a "tentative draft of an order" that "could scarcely have been more explicit or detailed" and that advised the parties of "exactly" what the I.C.C. proposed to do so that they could formulate and present their objections. 410 U.S. at 243-44. In this case, no such notice was ever given. The Commission here merely issued a vague and general notice that did not adequately apprise AT&T and other parties of the actions the Commission proposed to take. It thereafter issued the Report and Order without first releasing a first report, which might have provided specific proposals to which AT&T and the other parties could have made direct and precise responses.

tiary hearings are required under Section 205(a) where, as here, important factual questions are presented.²⁷

B. The Well-settled Interpretation of Section 205(a) Requires an Evidentiary Hearing To Resolve Disputed Factual Issues.

Like its predecessor, Section 205(a) of the Communications Act has consistently been construed to require an evidentiary hearing to resolve disputed factual matters before practices or rates may be prescribed by the Commission. In particular, this Court has on three occasions held that the conduct of such a hearing is imperative for any exercise of the Commission's authority to prescribe practices and rates under Section 205(a). One of those cases involved factual and policy issues that are indistinguishable from those presented here.

In *AT&T v. FCC*, *supra*, 449 F.2d 439, this Court rejected the Commission's efforts to achieve results that were identical to those involved here, with respect to one of the private line services encompassed by these orders, on the basis of the same procedural shortcuts that were used in this case. The Court set aside the Commission's order prohibiting restrictions on sharing of Telpak, a bulk private line service offered by AT&T, because it had not conducted an evidentiary hearing to resolve disputed factual matters and had not made supported findings that the new practices and rates resulting from its order were just, fair, and reasonable. The Court held that the prohibition of such sharing restrictions necessarily constitutes a prescription of practices and rates within the meaning of Section 205(a), and emphasized that in such situations the section's requirements must be fully satisfied. *Id.* at 451.

²⁷ Those factual questions are summarized below, at 43-49. Even cases relied upon by the Commission have specifically recognized that the existence of material factual issues in and of itself generally requires an agency to conduct evidentiary hearings. *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250, 1267 (3d Cir. 1974); *Air Line Pilots Ass'n v. CAB*, 475 F.2d 900, 904 (D.C. Cir. 1973).

Similarly, in *National Ass'n of Motor Bus Owners v. FCC*, *supra*, this Court again held that evidentiary hearings are essential under Section 205(a) to resolve factual questions. In discussing the Commission's decision not to prescribe a remedy after its Telpak sharing decision, the Court stated that

"The Commission was faced with the prospect that if it continued to employ the first of the alternatives available (prescription) there would be a long delay occasioned by the *necessity of holding evidentiary hearings and making findings pursuant to § 205(a) before a final order could be entered.* . . .

* * *

"As we pointed out earlier, however, the Commission's assumption that elimination of all sharing would be unlawfully discriminatory *was unwarranted in the absence of evidentiary hearings and findings.*" *Id.* at 564 (emphasis added).

The Court's description of the procedural deficiencies of the Commission's first Telpak sharing order provides unequivocal evidence that the Commission may not, as it has sought to do here, reduce the full hearing requirement of Section 205(a) to a mere Notice and Comment proceeding. There is no doubt that in the Telpak sharing proceeding AT&T and other parties were given opportunities to submit evidence, and that hearings were actually conducted on the issue of alleged discrimination under Section 202. If the Commission's current claims were correct, nothing further should have been required. In fact, however, this Court expressly declared that the Commission's Telpak sharing order had been held to be invalid because the Commission had failed *both* to conduct a hearing regarding the prescription issue—*i.e.*, whether some, all or no sharing was appropriate—*and* to make reasoned findings that the prescribed rates and prescribed practice of sharing were just, fair, and reasonable. *Id.* at 563. The Commission's current claims are irreconcilable with the

principles announced by this Court. See also *AT&T v. FCC*, *supra*, 487 F.2d at 874.

Any possible doubt as to the requirements of Section 205(a) has been eliminated by the previous actions of the Commission itself, which has recognized that evidentiary hearings are required by the section in situations such as this. After the Commission's order prescribing sharing of Telpak was set aside by this Court, the Commission acknowledged that:

"[I]f . . . the Commission desires to prescribe the specific course of action that the carriers must take in eliminating the unlawful discrimination, the Commission shall conduct further proceedings to develop a fuller evidentiary record upon which to base such prescription." *In re: Telpak Sharing*, 31 F.C.C. 2d 674, 675 (1971).

The Commission's statement was fully consistent with earlier decisions, in which it interpreted Section 205(a) to prohibit a prescription of carrier rates and practices "in the absence of a formal hearing." *In re AT&T*, 2 F.C.C.2d 173, 177-178 (1965); *In re California Public Utilities Commission*, 4 P&F Rad. Reg.2d 498, 501 (1965).

In its Memorandum Opinion and Order upon reconsideration, the Commission conceded that its *Telpak Sharing* decision had "impl[ied]" the need for evidentiary hearings, but sought to distinguish this case because it assertedly involves the formulation of "general policy." (Mem. Op. at n.5) (App. at 155.) The claim is without merit. Although the Commission's orders here encompass various forms of private line services in addition to Telpak, the purposes and results of the orders are indistinguishable from those of its first Telpak sharing order. Even the rationale for the Commission's present orders is identical to that offered for its earlier Telpak order. In both cases, the Commission found that existing tariffs provide for selective resale and sharing, and jumped to

the conclusion that all restrictions on those activities must be impermissible. In the first order, the Commission's conclusion related only to Telpak, while here it relates both to that service and various others, but the procedural and logical deficiencies of the orders are identical. The Commission here has merely broadened the scope of its first order, and attempted on a larger scale to utilize the same procedural shortcuts that were found unlawful there to achieve the same results.

Here, as in the previous Telpak order, the inevitable practical consequence of the Commission's action is a substantial rate change for large numbers of customers. In substance and effect, the Commission has sought here, as it has already attempted once before regarding Telpak, to resolve factual questions involving the prescription of practices and rates without the full hearing and findings required by Section 205(a). The prior decisions of this Court with respect to the interpretation of Section 205(a) are directly controlling here and, in accordance with those decisions, the Commission's failure to conduct evidentiary hearings requires that its orders be set aside.

C. None of the Commission's Purported Justifications Provides a Basis for Its Reliance on Informal Rulemaking Procedures Here.

The Commission apparently recognized that serious questions are raised by its efforts to disregard the requirement for a "full" hearing under Section 205(a), and to employ informal Notice and Comment procedures to resolve the numerous factual issues involved here. In an effort to respond to those well-founded questions, the Commission prepared an appendix to its Report and Order which sought to reconcile its summary procedures with the procedural rights of the parties. Despite the unequivocal instructions of this Court regarding the proper interpretation of Section 205(a), the Commission claimed in its appendix that the section does not require more

than informal Notice and Comment procedures. The Commission sought to justify this claim on four bases:

- (1) The asserted presence of "policy" questions common to a large number of regulated parties;
- (2) The fact that Section 4(j) of the Act permits the conduct of such proceedings "as will best conduce to the proper dispatch of business and to the ends of justice;"
- (3) The Commission's interpretation of the legislative history of the Communications Act regarding the hearing provisions of Title II of the Act; and
- (4) The absence of the words "on the record" from the hearing provisions of Title II.²⁸

As we show below, however, none of the bases relied upon by the Commission justifies its refusal to conduct full evidentiary hearings to resolve factual issues under Section 205(a), in accordance with the interpretation of that section already adopted by this Court.

1. THE PRESENCE OF QUESTIONS APPLICABLE TO MULTIPLE PARTIES DOES NOT EXCUSE COMPLIANCE WITH THE FULL HEARING REQUIREMENT OF SECTION 205(A).

The Commission's reference to "general policy questions" common to a large number of "regulatees" provides no justification for its reliance here on informal Notice and Comment procedures. It is significant that no effort was made by the Commission to show that such unidentified policy questions could not have been fully and appropriately resolved in evidentiary hearings. To the contrary, far from impeding the resolution of any such questions, evidentiary hearings would have afforded the Commission a meaningful factual foundation upon which to decide them. As we show below, the absence of

²⁸ R. & O. at Appendix D, p. 3 (App. at 119).

such a factual basis is itself an important reason why the Commission's orders should be set aside. *Infra* at Part III.

Moreover, when this Court invalidated the Commission's first attempt to prescribe unrestricted sharing of Telpak without an evidentiary hearing or adequate findings, the same underlying questions of policy must surely have been reflected in the Commission's order.²⁹ The rationale for that order was identical to the rationale now advanced by the Commission for its present orders. Notwithstanding the possible existence of such "general policy questions," this Court held that the Commission was not permitted to utilize the same procedural shortcuts that it has sought to employ here.³⁰

Nor may evidentiary hearings be avoided merely because a "large number of regulatees" may be involved. (R. & O. at Appendix D; Mem. Op. on Recon. at para. 4) (App. at 119, 154-56.) The number of regulated parties obviously cannot reduce the importance of a full and accurate resolution of factual matters in Section 205(a) proceedings. To the contrary, the significance of factual accuracy and careful procedures should increase, not di-

²⁹ Those same "policy" matters must also have been embodied in the various interests that, as this Court found in *AT&T v. FCC*, *supra*, 487 F.2d at 874, were balanced and accommodated by Congress when it formulated Section 205(a). Accordingly, such matters cannot provide any proper justification for disregarding the procedural requirements imposed by Congress upon the Commission's exercise of its authority under Section 205(a).

³⁰ Even if it were thought that the issues here could be matters of "general policy" that might be encompassed by some implicit exception to the requirements of Section 205(a), it would be clear that the Commission's orders are fatally deficient. We show below that the orders represent a radical departure from "prior norms," and that such a departure imposes a stringent "duty" upon the Commission to explain and justify its action. *Atchison, T. & S.F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). In this instance, however, the Commission has not even attempted to assess rationally the implications of its far-reaching orders, and hence was incapable of providing a meaningful justification for its action. The Commission's inability to provide such a justification requires that its orders be set aside. *Id.* See also *infra* at 47-48.

minish, as the consequences of a proceeding are widened. *Wilson & Co. v. United States*, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951, *remanded*, 382 U.S. 454 (1966). One of the cases principally relied upon by the Commission clearly recognizes that the presence of numerous regulated enterprises cannot afford an agency "carte blanche" to utilize summary procedures" where contested facts must be resolved. *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1255, 1257 (D.C. Cir. 1973).

In any event, this is not a situation in which the Commission's orders have a uniform impact upon a large number of similarly situated carriers, each of which seeks to assert essentially identical claims. To the contrary, the Commission's orders in this case have special and particular implications for AT&T. Those special implications are vividly illustrated by the Items of Inquiry designated by the Commission for this proceeding, which included numerous factual issues that pertained specifically to AT&T. (App. at 24-25.)³¹ The Commission proposed to make inquiry, for example, as to the impact of private line resale and sharing on AT&T's facilities, AT&T's planning, AT&T's traffic volumes, AT&T's revenues and AT&T's rate of return. Correspondingly, a major part of the Commission's discussion in the Report and Order was addressed specifically to AT&T's services and tariffs.³²

³¹ The Supreme Court has repeatedly recognized that more rigorous hearing requirements are created where apparently general decisions have an exceptional impact on specific persons. Compare *Londoner v. Denver*, 210 U.S. 373 (1908), with *Bi-Metallic Investment Co. v. Bd. of Equalization*, 239 U.S. 441 (1915). See also *United States v. Florida East Coast Railway Co.*, *supra*, 410 U.S. at 245.

³² The Commission expressly recognized that various other carriers simply "concur" in AT&T's tariffs, and that AT&T is the "principal" supplier of the communications services and facilities that are involved here. (R. & O. at para. 27) (App. at 48.) In these circumstances, it is clear that this case does not involve industry-wide issues in the same sense as the Federal Power Commission cases upon which the Commission has sought to rely. In those cases, the FPC was evidently concerned with multitudinous factual matters relating to dozens, and in some instances even hundreds, of relatively small suppliers, all of whom had essentially identical claims and interests.

Any possible doubt that AT&T's tariffs and facilities are the principal focus of the Commission's orders is eliminated by the proceeding's origins. This entire proceeding was evidently motivated, at least in large part, by claims filed by American Trucking Associations against AT&T alone. The claims related to sharing and resale provisions of AT&T's Telpak tariff—which the Commission ultimately ordered to be eliminated as part of its general prescription of resale and sharing. (R. & O. at para. 9A) (App. at 34.)

The numerous issues of disputed fact in this proceeding that relate specifically to AT&T cannot be omitted or disregarded merely because other parties might also have interests in the outcome of the proceeding. Any such rule would permit the Commission to evade its responsibilities under Section 205(a) in virtually every instance. Unless the section's requirements are to be reduced to a nullity, AT&T's rights and the Commission's statutory obligations cannot be made contingent merely on the number of other parties who may to some degree be thought to be interested in a matter.³³

2. SECTIONS 4(I) AND 4(J) OF THE COMMUNICATIONS ACT DO NOT PERMIT THE COMMISSION TO DISREGARD THE PROCEDURES ESTABLISHED BY CONGRESS IN SECTION 205(A).

As its second factor, the Commission asserted that Sections 4(i) and 4(j) of the Act provide support for its efforts to resolve disputed factual issues without an evidentiary hearing. (R. & O. at Appendix D, p. 7) (App. at

³³ The special impact of the orders upon AT&T readily distinguishes this case from many of the decisions relied upon by the Commission. For example, in *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968), a case involving the broadcasting provisions of the Act, this Court carefully distinguished cases, such as this, "when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else." *Id.* at 618.

124.)³⁴ In its decision in *AT&T v. FCC*, *supra*, 487 F.2d 864, however, this Court rejected precisely the same argument by the Commission. The Court expressly held that any exercise of the Commission's authority pursuant to Sections 4(i) and 4(j) "must not be inconsistent with Sections 203-205." *Id.* at 877.

The Commission's argument both here and in 1973 was based on an asserted analogy with *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). This Court showed clearly in the earlier case that *Permian Basin* is readily distinguishable. The Court emphasized that *Permian Basin* involved a step adopted by the FPC *after* it had prescribed rates on the basis of a full evidentiary hearing and had made a determination that the prescription was just and reasonable. *AT&T v. FCC*, *supra*, 487 F.2d at 877. Here, as in the Commission's first Telpak sharing order, no such evidentiary hearings have been held under Section 205(a) to resolve factual issues. In these circumstances, the Commission's continued reliance upon *Permian Basin* still cannot justify its efforts to circumvent the Act's requirements.

The Commission's claim has also been unequivocally rejected by the Supreme Court. In *FCC v. Schreiber*, 381 U.S. 279 (1965), the Court held that the Commission is not empowered by Section 4(j) to disregard the procedures and requirements established by other provisions of the Act. The Court left no doubt that Section 4(j) only grants authority to the Commission to resolve minor procedural matters that are not the subject of specific statutory requirements or provisions. It described the

³⁴ Section 4(i) provides that:

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions." (Emphasis added.)

In pertinent part, Section 4(j) provides that:

"The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . ."

narrow authority given to the Commission in the following terms:

"[Section 4(j)] 'explicitly and by implication' delegate[s] to the Commission the power to resolve subordinate questions of procedure . . . [such as] the scope of inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions.'" *Id.* at 289.

The same conclusion was also reached by the Court in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *See also Federal Broadcasting System v. FCC*, 225 F.2d 560, 566 (D.C. Cir.), *cert. denied*, 350 U.S. 923 (1955).

Even the Commission evidently recognized that Sections 4(i) and 4(j) cannot empower it to disregard the Act's other commands. It conceded that those Sections "would not be sufficient to dispense with an evidentiary hearing if Section 205(a) were interpreted to require it." (R. & O. Appendix D, p. 8) (App. at 125.)³⁵ Nonetheless, the Commission claimed that an expansive interpretation of Sections 4(i) and 4(j) might facilitate more effective execution of the substantive provisions of the Act.³⁶ Even

³⁵ The Commission's concession simply reiterated its acknowledgment in an earlier matter that the "specific and limited" authority granted under Section 205 "delimits" the Commission's power under Sections 4(i) and 4(j). In the Matter of AT&T, 14 F.C.C. 2d 564, 566-67 (1968). *See also* Associated Press v. FCC, 448 F.2d 1095, 1101 (D. C. Cir. 1971).

³⁶ The Commission's reliance for this purpose upon *Phillips Petroleum Co. v. FPC*, 475 F.2d 842 (10th Cir. 1973), is without foundation. The FPC there had evidently conducted an "informal hearing" (475 F.2d at 844), and the issue was whether such informality was permissible. In this instance, however, the relevant statutory provision expressly requires a "full" opportunity for hearing, and the issue here is not the formality or informality of the hearing—no hearing of any description was ever held—but whether the Commission can altogether disregard the requirement that an evidentiary hearing be conducted. Moreover, the provisions of the Natural Gas Act corresponding to Sections 4(i) and 4(j) have been held not to authorize the FPC to circumvent the specific rate and practice prescription procedures found elsewhere in that statute. *Willmut Gas and Oil v. FPC*, 294 F.2d 245 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975

if this were true, it cannot justify the Commission's efforts to circumvent Congress' instructions. As shown above, Section 205(a) has repeatedly been held to require full evidentiary hearings and appropriate findings before a prescription of practices and rates may be sustained. As this Court has already emphasized:

"To permit the Commission to achieve the same result as it would pursuant to a Section 205 rate prescription, by circumventing the statutory hearing and finding requirements on the basis of its claimed broad inherent regulatory power, would defeat the purpose of Section 205 and vitiate the specific statutory scheme." *AT&T v. FCC*, *supra*, 487 F.2d at 874-75.

3. THE COMMISSION'S USE OF INFORMAL PROCEDURES IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT.

Although the Commission included the legislative history of the Communications Act among the four factors upon which it relied to support its refusal to conduct an evidentiary hearing, it did not in fact refer to any part of the legislative history that provides any meaningful support to its claim. The Commission's position is scarcely more than that the Act should be construed to afford it wide discretion to adopt whatever procedures it finds appropriate to achieve whatever results it deems desirable. There is no justification for disregarding the requirements of Section 205(a) on the basis of such a claim.³⁷ To the contrary, if, as the Supreme Court has instructed, the entire Act is examined to ascertain Con-

(1962). Finally, it should be observed that *Phillips* itself has been rejected by at least one other circuit. *Mobil Oil Co. v. FPC*, 483 F.2d 1238, 1262 (D.C. Cir. 1973).

³⁷ A similar argument by the Commission was unequivocally rejected by this Court in *AT&T v. FCC*, *supra*, 487 F.2d at 872-78. The Court made clear that although the Commission has a degree of discretion in the implementation of its mandate, it cannot disregard the statutory limitations upon its authority or the procedures commanded by Congress.

gress' intentions,³⁸ it is clear that the full hearing requirement of Section 205(a) must be rigorously enforced.

The regulatory structure of the Act is premised upon the establishment by carriers of their practices and rates without prior approval of the Commission. *AT&T v. FCC*, *supra*, 487 F.2d at 871. While the Commission has authority to suspend or prohibit practices and rates in circumstances defined by the Act, such actions are taken in response to tariffs and practices initially established by the carriers. When the Commission seeks to prescribe practices and rates, as it has here, it reverses the ordinary regulatory pattern. Not surprisingly, Congress surrounded the extraordinary remedy of prescription with detailed procedural and substantive obligations that must be satisfied before the Commission may compel carriers to adopt practices and rates which they have not themselves initiated. Those obligations reflect Congress' careful efforts to balance and accommodate important interests and values. As this Court has previously emphasized, the Commission may not alter or upset the balance established by Congress:

"The ratemaking provisions of the Communications Act were intended to provide for orderly processing of proposed rate revisions. [Citations omitted.] In balancing the various interests involved Congress provided the comprehensive statutory plan [of Sections 203-205 of the Act]. The Commission is not authorized to circumvent this statutory scheme by making its own equitable adjustments." *AT&T v. FCC*, 487 F.2d at 881.

Far from supporting the Commission's orders in this case, the overall regulatory pattern established by Congress in the Act demands that the procedural requirements of Section 205(a) be fully and rigorously adhered to. As we have shown above, they have not been in this case.

³⁸ *United States v. Florida East Coast Railway Co.*, *supra*, 410 U.S. at 238-42.

4. THE ABSENCE OF THE WORDS "ON THE RECORD" DOES NOT ELIMINATE THE NEED TO CONDUCT FULL EVIDENTIARY HEARINGS UNDER SECTION 205(A).

The fourth factor relied upon by the Commission to justify its refusal to conduct an evidentiary hearing was the absence of the words "on the record" from the hearing sections of Title II of the Act. (R. & O. at Appendix D, para. 5) (App. at 120-22.) The claim is clearly without merit. At the outset, it is significant that, unlike the sections that have been held to permit abbreviated or informal procedures, Section 205(a) expressly provides for a "*full opportunity for hearing.*" (Emphasis added.) Congress' adoption of such an unusually specific and comprehensive requirement provides strong evidence that it did not intend to permit the inadequate procedures utilized here.³⁹

In contrast to almost all of the other provisions of Title II, Section 205(a) authorizes the Commission to compel affirmative action by carriers. As described above, it reverses the ordinary regulatory pattern, and permits the Commission to undertake functions that are ordinarily performed initially only by the carriers.⁴⁰ Such an important alteration of the usual regulatory procedures necessarily obliges the Commission to act with special care, after reasoned consideration of pertinent factual questions. Congress understandably emphasized the importance of a thorough consideration of factual matters by

³⁹ Thus, it has been held that Congress, in calling for a "full hearing" under the former terms of Section 309(b) of the Act, "could not have expressed in plainer words its intent that, where there are unresolved factual issues, the hearing should be of an evidentiary nature." *Clarksburg Pub. Co. v. FCC*, 225 F.2d 511, 514-15 (D.C. Cir. 1955). See also *Retail Store Employees U., Local 880 v. FCC*, 436 F.2d 248, 254 (D.C. Cir. 1970).

⁴⁰ Pursuant to Section 205(b), violations of orders issued under Section 205(a) are punishable against a carrier, its officers and agents by forfeiture of \$1,000 per day.

insisting that the Commission conduct "full" hearings before it may prescribe practices or rates.⁴¹

Similarly, Section 214(d) of the Act also requires a "full opportunity for hearing" to resolve factual questions before the Commission may order a carrier to construct new or improved facilities for communications services. Here again, the Commission is permitted in unusual situations to override the carriers' discretion in deciding upon capital outlays for improvements or extensions in service. In those special situations, as under Section 205(a), Congress concluded that particular care in resolving factual issues is essential.⁴²

Congress' careful inclusion in Section 205(a) of an express requirement for a "full" opportunity for hearing readily distinguishes this case from the decisions relied upon by the Commission. Here, as in *Morgan v. United States*, *supra*, and *Clarksburg Pub. Co. v. FCC*, *supra*, Congress' unusual insistence upon a "full" hearing demands that AT&T be afforded an evidentiary hearing regarding specific proposals for change, in which it is permitted to offer testimony and other evidence re-

⁴¹ One of the cases principally relied upon by the Commission emphasized that where Congress has made clear that a "relatively high degree of evidentiary support" is needed for an action, the procedures selected by the agency must be designed to satisfy that requirement. *Mobil Oil Corp. v. FPC*, *supra*, 483 F.2d at 1257. In this instance, it is clear that Congress has required a high degree of factual support for the extraordinary remedy of prescription, and that the Commission was obliged to utilize procedures that were appropriate to satisfy that requirement. In fact, however, as we have shown above, the Commission's procedures fell far short of that standard.

⁴² The Commission's reliance on *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975), to justify its efforts here to utilize informal Notice and Comment procedures is clearly misplaced. The court there was interpreting Section 214(a), which does not expressly require a hearing to be conducted before certificates of public convenience and necessity can be granted. Whatever may be the proper interpretation of Section 214(a), Sections 214(d) and 205(a) are obviously different in that they unequivocally require a "full" opportunity for a hearing.

garding factual issues, and in which it may challenge the factual allegations made by others.⁴³

Even apart from the special statutory requirement involved here, the decisions relied upon by the Commission in fact show that the absence or presence of the phrase "on the record" is not controlling as to whether an evidentiary hearing is required. Thus, in *Mobil Oil Corp. v. FPC*, *supra*, one of the decisions chiefly relied upon by the Commission, the court expressly recognized that there is "danger" in according great significance to such "magic words." *Id.*, 483 F.2d at 1250. It made clear that the absence of the words "on the record" did not afford the FPC "*carte blanche*" to utilize "sketchy procedures" to resolve important matters of disputed fact in connection with rates. *Id.* at 1255, 1257. It emphasized that the procedures adopted by an agency must at a minimum "adequately test the Commission's factual determinations and create a record that will allow a reviewing court to examine the agency's actions." *Id.* at 1262. For this purpose, there must

" . . . be some mechanism whereby adverse parties can test, criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination and rely upon written questions and responses. . . . But whatever procedure is followed, it must assure that the Commission has a substantial

⁴³ Such a result is in fact fully consistent with the case principally relied upon by the Commission. In *United States v. Florida East Coast Railway*, *supra*, the Court expressly recognized that *Morgan* involved a "form of ratemaking" under a statutory requirement for a "full" hearing. 410 U.S. at 242-43. The Court distinguished *Morgan* because, unlike *Morgan*, the parties in *Florida East Coast* had been given complete notice of the ICC's intended actions and adequate opportunities to present relevant factual evidence. *Supra*, at note 26. The Court drew attention to the possible importance of the "full" hearing requirement, but was not compelled to determine its complete significance because of its interpretation of the facts before it. 410 U.S. at 243.

evidentiary basis for its findings and it must provide the court with an adequate record on review." *Id.* at 1262-63.

In a situation such as this, where numerous factual questions arise from the Commission's far-reaching prescriptions, the requirements for a fair and adequate proceeding are necessarily far more stringent than would be the case if, for example, there were no contested factual matters and only minor or abstract pronouncements of policy were under consideration. Whatever might be the significance of *Mobil* in other situations, it provides no basis for the Commission's failure to adopt any procedures that could permit it to evaluate adequately the important and complicated factual questions presented here.⁴⁴

In addition, a more recent decision by the same Court of Appeals has made clear that the absence or presence of the words "on the record" cannot alone determine the procedures which must be followed by regulatory agencies under the Administrative Procedure Act. In *Independent Bankers Ass'n of Ga. v. Board of Gov. of F.R.S.*, 516 F.2d 1206 (D.C. Cir. 1975), the Board of Governors had argued, precisely as the Commission did in its orders here, that when a statute does not contain an "on the record" requirement, the provisions for a hearing may be satisfied merely by Notice and Comment procedures. *Id.* at 1217. The court unequivocally rejected such a mechanical standard for determining important procedural questions.⁴⁵ It emphasized that the Board's efforts to balance "public benefits" and "adverse effects" could be properly performed "only through the use of trial-type procedures." *Id.* at 1218. Here, as in *Independent Bank*, the

⁴⁴ Those factual matters are described above at 11-12 and below at 42-49.

⁴⁵ The court readily distinguished *Florida East Coast*, upon which the Board relied—just as does the Commission here—because the decision there turned upon the particular "statutory context" and special legislative history of Section 1(14)(a) of the Interstate Commerce Act. 516 F.2d at 1218.

agency's orders were expressly premised upon a weighing of "public detriment" and "countervailing benefits." (R. & O. at paras. 35, 40) (App. at 55, 58.) The Commission's efforts to balance those competing factors necessarily required an assessment of complex and inconsistent factual contentions. Here, as in *Independent Bank*, written submissions cannot be a proper substitute for an evidentiary hearing in which such factual contentions may realistically be evaluated.

D. The Commission's Failure to Conduct the Evidentiary Hearing Required by Section 205(a) Resulted in Substantial Prejudice.

This is not a situation in which the Commission's failure to comply with the Act's procedural requirements may be discounted as harmless or insignificant. The Commission's refusal to conduct the full hearing required by Section 205(a) denied AT&T and other parties an opportunity to challenge and correct important errors of fact upon which the Commission's orders are based. The Commission itself was, as a consequence of the inadequate procedures it employed here, unable either to make a rational assessment of important matters of contested fact or to evaluate the far-reaching implications of its orders.

An overriding factual issue presented here was the nature and significance of the impact of the Commission's orders. As we have shown above, *supra* at 6-7, the Commission's new requirement for sharing and resale will have adverse consequences which will reach far beyond private line services. Shifts in the services utilized by many customers will reduce the net revenues produced by long distance and other services, and ultimately may require significant changes in the rate structures of those services. Layers of middlemen will appear between carriers and the ultimate users of their facilities. "Novel" services will develop. These and other important changes may reason-

ably be expected substantially to restructure the entire telecommunications industry.

Despite the evidence offered by AT&T regarding the adverse consequences of these far-reaching changes, the Commission did not pause to make meaningful efforts to evaluate those consequences. It was content merely to *assume* that the asserted benefits of unrestricted sharing and resale will outweigh its disadvantages. It disregarded the specific factual evidence provided by AT&T's economic impact study, and relied almost exclusively upon OTP's conclusory assurances, even though OTP itself had conceded that it did not know the "scale" and "direction" of the possible impacts. (App. at 1121.) AT&T and other parties were not given an opportunity to test or challenge the validity of OTP's claims in an evidentiary hearing. If such a hearing had been conducted, those claims would have been subject to detailed analysis and rebuttal, and OTP would not have been permitted to take refuge in conclusory assurances that sharing might ultimately prove beneficial.

An evidentiary hearing would have permitted AT&T to demonstrate that, notwithstanding the changes in the scope of the Commission's orders announced after AT&T's economic study was submitted, the findings of that study have continuing validity to establish the adverse consequences of the orders. AT&T could have offered economic evidence addressed specifically to concrete proposals, which would have enabled the Commission and reviewing courts to ascertain with precision the costs and injuries created by those proposals. Factual questions relating to the economic impact of the orders, the consequences of the creation of a new "tier" of middlemen, and other important matters could have been resolved on the basis of an adequate record. Instead, AT&T and the other parties were allowed merely to submit written comments in response to a vague and general announcement that the Commission was considering important new

regulatory requirements.⁴⁶ The Commission's failure to conduct an evidentiary hearing or to take other adequate steps to evaluate the implications of its orders denied it "the materials requisite for a rational decision." *National Air Carriers Ass'n v. CAB*, 442 F.2d 862, 868 (D.C. Cir. 1971).⁴⁷

II.

THE COMMISSION WAS REQUIRED TO MAKE REASONED FINDINGS THAT THE PRESCRIBED RATES AND PRACTICES ARE JUST, FAIR, AND REASONABLE.

The Commission has conceded that its orders constitute a prescription of practices within the meaning of Section 205(a). Nonetheless, it has sought to claim here, just as it did with respect to its first Telpak sharing order, that

⁴⁶ The vague and general notice of the Commission's intentions provided to the parties at the outset of this proceeding is an independent justification for setting aside these orders. Even where the special statutory obligations applicable here are not present, and the Commission is permitted, as it was not here, to utilize informal Notice and Comment procedures, it still "has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Office, Inc. v. FCC*, — F.2d — No. 75-1280 (D.C. Cir. Mar. 25, 1977) (slip opinion at 51) (emphasis added). *A fortiori*, the Commission must, where the special requirements of Section 205(a) are applicable, provide far more specific and detailed notice of its intentions than it has done here.

⁴⁷ The inadequacies of the procedures adopted by the Commission here could easily have been avoided if the Commission had merely adhered to the methods proposed in its original Notice. The Commission originally indicated that it would, after receiving comments from interested parties, issue a First Report and Order. The issues raised by the specific proposals included in such a First Report could thereafter have been addressed by the parties in subsequent proceedings, including an evidentiary hearing to resolve disputed matters of material fact. Instead, the Commission unaccountably failed to issue a First Report or to provide any opportunity for a factual hearing, and merely terminated the proceeding after receiving written comments. In its Memorandum Opinion and Order upon reconsideration, the Commission conceded that it had indicated originally that it contemplated such further proceedings, and could only assert that it had belatedly decided that additional proceedings did not "appear necessary or appropriate." (Mem. Op. at n. 8) (App. at 158.)

it has not prescribed rates.⁴⁸ The claim is without merit. The inevitable practical consequence of the Commission's orders will be that many customers will shift from WATS and long distance service to shared or resold private line services. As a result, all or most of those customers will be paying rates that will be different from those they are now paying. Here, as in the Telpak sharing case, the Commission has ordered a substantial rate change for numerous customers. *AT&T v. FCC*, *supra*, 449 F.2d at 451.

Even if it were true, as the Commission argued in its Memorandum Opinion and Order upon reconsideration (App. at 156-57), that all of its determinations may indirectly affect rates, such a claim provides no justification for disregarding the requirements of Section 205(a) in this instance. The impact here upon rates is not distant and tangential, as the Commission seeks to suggest, but direct and substantial. Even OTP acknowledged that many customers will shift from one form of service to another, that deaveraging of rates may follow, and that the rates paid by many segments of the public are likely to be altered as a result of resale and sharing. (App. at 1126-29.) The Commission itself conceded that a "number of users" would receive rate changes as a result of the orders. (R. & O. at para. 49) (App. at 64-65.)⁴⁹

In its decision in the Telpak sharing case, this Court left no doubt that sharing orders are prescriptions of rates

⁴⁸ In its memorandum to this Court in opposition to AT&T's motion for stay, the Commission conceded that it has prescribed practices, but denied that it has prescribed rates. (At 15.) In contrast, MCI's memorandum regarding the motion candidly recognized that the Commission's orders had held the existing rate structure unlawful. (At 5.)

⁴⁹ In addition, the Commission recognized in its Memorandum Opinion upon reconsideration that deaveraging of private line rates "might" occur. (App. at 156-57.) The impact that the orders will have upon AT&T's rates is described in AT&T's submissions to the Commission (App. at 257-77), as well as in the Healy affidavit attached to AT&T's motion to this Court to stay the orders pending judicial review. (Exhibit H to the motion, at para. 13.)

and that the Commission must adhere to the statutory procedures for ratemaking or be set aside on judicial review. The Court stated that:

"The impact of . . . [the Commission's] order requiring unlimited sharing is to fix and prescribe rates for application to an enlarged group of customers; and since the lower Telpak rates are not now available to this enlarged group, the order in effect is equivalent to an order requiring a widespread rate reduction. Under § 205(a) the Commission cannot prescribe a rate without finding that the rate prescribed is just and reasonable." *AT&T v. FCC*, *supra*, 449 F.2d at 451.⁵⁰

In this instance, however, the Commission conceded that it did not even seek to determine the "exact revenue impact" of its orders. (R. & O. at para. 49) (App. at 64-65.) Without such a determination, any finding as to the justness or reasonableness of the rate changes it has prescribed was impossible. The Commission's failure to make such a finding was one of the deficiencies that caused this Court to set aside the Commission's first Telpak sharing order. 449 F.2d at 451. The same result should follow here.

Moreover, even the Commission's purported finding as to its prescribed practice of sharing and resale is without a meaningful factual basis. It is insufficient for the Commission merely to recite, as it has here, that the statutory

⁵⁰ Similarly, it has uniformly been held that the substance and actual impact of agency action, and not its form, determine the nature of the findings and evidence required to support the action. *See, e.g.,* *Baltimore and Ohio R.R. v. United States*, 277 U.S. 291, 300 (1928); *Houston Belt & Terminal Ry. v. United States*, 153 F. Supp. 3, 7-8 (S.D. Tex. 1957), *aff'd* 356 U.S. 23 (1958); *Moss v. C.A.B.*, 430 F.2d 891 (D.C. Cir. 1970). In particular, it has been emphasized that "the Commission need not explicitly announce its actions as a prescription to have that effect." *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975). *See also* *AT&T v. FCC*, *supra*, 487 F.2d at 874.

standard has been met;⁵¹ any such finding must instead be supported by a careful evaluation of the asserted advantages and probable costs of the Commission's proposals. The Commission was obliged to provide a "reasoned analysis" of the consequences of its new requirements and the basis for its action. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Commission's failure to investigate the revenue and other implications of its orders through evidentiary hearings prevented it from making a meaningful comparative analysis. Instead, the Commission sought to disregard the evidence before it of the costs and disadvantages of its orders, and was content to rely merely upon conjecture and assumption to establish their asserted advantages.⁵² In these circumstances, the Commission's purported finding cannot satisfy the requirements of Section 205(a).

III.

THE COMMISSION'S ORDERS ARE NOT BASED UPON A REASONED EVALUATION OF THEIR CONSEQUENCES AND LACK A RATIONAL BASIS IN THE RECORD.

It is rudimentary that all of the Commission's decisions must be rationally supported by the record. *See, e.g., Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974); *American Trucking Associations v. FCC*, 377

⁵¹ In fact, the Commission's findings even halt short of a full recital of the statutory language for a prescription of practices. Section 205(a) carefully distinguishes between the finding required for prescribed rates, which must be found to be "just and reasonable," and the finding for prescribed practices, which must be found to be "just, fair, and reasonable." Although the Commission purported only to prescribe practices, and not rates, it recited the former language and not the latter.

⁵² In a similar situation, the District of Columbia Circuit held that the Commission's orders must be set aside when it sought to disregard the only evidence before it and resolve factual matters inconsistently with that evidence. The court made clear that in such situations an affirmative duty is placed upon the Commission to ascertain the relevant facts through appropriate procedures. *AT&T v. FCC*, — F.2d — (No. 74-2101) (Feb. 1, 1977).

F.2d 121, 134 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). The Commission must base its decisions upon grounds which are "clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). As the Supreme Court has emphasized, it is full adherence to these requirements "which alone makes effective judicial review possible" *Baltimore & O. R.R. v. Aberdeen & R.R.R.*, 393 U.S. 87, 92 (1968). As we show below, the Commission plainly failed to satisfy these fundamental requirements here.

A. Essential Provisions of the Report and Order Are Without Rational Basis and Were Not Meaningfully Evaluated by the Commission.

With the exception of OTP and Orlando, none of the 43 participating parties advocated the extreme action which has been prescribed by the Commission's orders. In fact, the parties generally shared AT&T's concern that resale and sharing would detrimentally affect the public through adverse rate, service and pricing consequences,⁵³ and stressed that a substantial diversion of revenues would result from such a policy.⁵⁴ Several parties warned

⁵³ The adverse rate and pricing effects associated with unlimited resale and sharing of private line services were discussed in AT&T's Comments, paras. 37-47, 49-52, 57, 58, 60-64; in AT&T's Reply, paras. 1, 7, 8; and in AT&T's Response, paras. 1-22, 24, 33-35. (App. at 261-74, 1155-56, 1161-62, 1289-1302, 1307-09.) The adverse service effects were discussed in AT&T's Comments, paras. 65-69; and in AT&T's Response, paras. 28, 29, 36. (App. at 275-77, 1304-05, 1310-11.)

See also Comments of: United, App. at 305; SPCC, App. at 535-36; GTE, paras. 2-3, 2-7; Western Union, para. 1; Telenet, App. at 407-08.

See Reply Comments of: United, App. at 1219-24; GTE, paras. 7, 8, 19; SPCC, paras. 1, 3, 4; ATA, App. at 1191-92; NAMBO, p. 2; Central Committee, App. at 1213; XERO-FAX, para. 10.

See Response of: ATA, App. at 1362-63, 1368, 1371; GTE, paras. IIIB, IIIC1c, IIIC5b, IIIC6b; MCI, para. 20; SPCC, p. 5.

⁵⁴ See Comments of: GTE, paras. 1-5, 1-13, 2-4; United, App. at 305; MCI Reply to Comments on Petition for Rulemaking, para. 34; SPCC, App. at 536.

See Reply Comments of: United, App. at 1222; GTE, para. 6; ATA, App. at 1191-92; ZERO-FAX, para. 10; Bunker Ramo, paras. 9-14.

that the removal of resale and sharing restrictions could create a chaotic condition in the industry by undermining AT&T's rate structure. They urged the Commission to proceed with caution.⁵⁵

Of the two proponents of unlimited resale and sharing, Orlando's comments were not relied upon by the Commission to support its orders. This is scarcely surprising, since those comments contained no facts or evidence to support its conclusions. Moreover, even the comments belatedly submitted by OTP recognized that sharing and resale could result in adverse consequences to carriers and the public, and acknowledged that OTP was unable to determine the "scale" and "direction" of those consequences. OTP urged the prescription of sharing and resale merely on the basis of vague and conclusory assurances that it would ultimately prove beneficial. *Supra*, at page 5.

A review of the Report and Order confirms the absence of any rational basis in the record and illustrates that essential provisions of the Commission's orders are based upon conjecture and speculation. For example, a principal factual issue raised by the Commission's orders is whether the creation of layers of middlemen between carriers and users will adversely affect the public. The Commission did not refer to any evidence to support its resolution of that issue, but instead merely averred that it "*do[es] not view*" such middlemen as contrary to the public interest, and "*reject[s]* the argument that the imposition of a middleman . . . is justification for the restrictions on resale and sharing." (R. & O. at para. 39) (App. at 58) (Emphasis added.)

⁵⁵ See Comments of: GTE, paras. 2-3, 2-7; United, App. at 305; SCC, para. 6; Telenet, App. at 407-08; Western Union, para. 18.

See Reply Comments of: GTE, paras. 4, 10, 11, 15, 19; Western Union, paras. 3, 11; Telenet, App. at 1176; RCA Globecom, paras. 2, 3; ARINC, App. at 1229, 1235, 1244; ATA, App. at 1205-06; UTC, App. at 1146-48.

See Response of: ADAPSO, para. 10; CBEMA, paras. 4, 7; MCI, paras. 10, 52.

In fact, the Commission's summary conclusions are manifestly wrong. AT&T demonstrated in its submissions to the Commission that the creation of such middlemen will have substantial adverse consequences for the efficient provision of telecommunications services. (App. at 275-77, 1304-06.) AT&T can effectively provide services and facilities only if it can accurately forecast and plan for the future needs of its ultimate users. Such forecasting and planning will be substantially more difficult and less reliable if AT&T no longer has a direct relationship with many of its ultimate users, but is instead forced to depend upon the predictions of numerous middlemen, at least some of whom may have very limited experience and skills in the telecommunications industry. (*Id.*) In these and other respects, the Commission's authorization of a new "layer" of middlemen will impose important administrative burdens and costs upon AT&T, and hamper the efficient provision of adequate telecommunications services. If the Commission had paused to examine these difficulties in a suitable evidentiary hearing, it would have been able to make a more rational appraisal of the consequences of its new requirements.

The Commission's orders also raise important factual questions regarding their revenue and rate consequences. With respect to those questions, the Commission did not offer any specific analyses or assessments of the orders' implications, but instead merely stated that "*we do not view* tariff restrictions on resale as justified merely because they protect carrier revenues or rate structures," and that it "*expects*" the benefits of its new policies to outweigh any possible adverse consequences. (R. & O. at para. 40) (App. at 58) (Emphasis added.) Here again, no specific factual support for these conclusory announcements was ever provided.

In fact, the Commission's assumptions are plainly wrong. Neither the Commission nor any of the other parties ever provided economic data or analyses which supported the Commission's findings or specifically controverted AT&T's

estimate of the adverse revenue and cost effects which will result from the Commission's new requirements.⁵⁶ The orders disregarded or arbitrarily rejected the evidence contrary to their conclusions. For example, the Commission rejected AT&T's economic impact study largely upon the basis of assumptions made by AT&T regarding customer behavior.⁵⁷ Although the Commission summarily condemned AT&T's assumptions, it did not venture to suggest what alternative assumptions it regarded as preferable, or to explain how any such alternative assumptions might affect its analysis of the implications of its orders. To the contrary, although the Commission conceded that "a number of users" would receive rate reductions, it claimed that it was not obliged even to determine "the exact revenue impact" of its orders. (R. & O. at para. 49) (App. at 64.)⁵⁸ As Commissioner Hooks candidly recog-

⁵⁶ AT&T explained to the Commission that it would take more time than the Commission had permitted to quantify fully the effects of unlimited sharing and resale on AT&T's revenues and costs. Nonetheless, AT&T submitted an economic analysis which was the best possible within the time limits established by the Commission. Its assumptions were based upon actual data and proven methods adopted from previous studies. AT&T's analysis is the only factual evidence in the record of the effects of the Commission's action and it clearly does not support the Commission's decision.

⁵⁷ Ironically, the Commission also attacked Western Union for assertedly making the opposite error. Western Union had complained that a full and exact analysis of the economic results of changes in practices could not be made until the Commission indicated with greater precision what changes it proposed to make. The Commission held that Western Union should nonetheless have prepared an economic study based upon assumptions regarding such matters as customer behavior—which was precisely the course for which AT&T was condemned. (R. & O. at para. 72) (App. at 75-76.)

⁵⁸ The Commission's claim is inconsistent with the principles recently announced by the Fourth Circuit in another case involving Section 205(a). In *North Carolina Util. Comm'n v. FCC*, — F.2d — (No. 76-1002) (Mar. 22, 1977), the court held that in the circumstances presented there the Commission was not compelled to conduct an "exhaustive" economic impact analysis, but made clear that a meaningful analysis was essential and that the Commission "could not blink reality and assume the impact away." (Slip opinion at 45, 48.) Whatever may be thought to have occurred in *North Carolina Util. Comm'n*, it is clear that the Commission here has not conducted a meaningful analysis at all, but instead has sought merely to "blink reality." See also *AT&T v. FCC*, *supra*, — F.2d —. *Supra* at note 52.

nized, the Commission has acted here without even "a scintilla of economic data" to support its "theorems." (App. at 142.)

In addition, the Commission rejected AT&T's economic study because, after the study was submitted, the Commission itself decided to omit WATS from its orders and, in a separate proceeding, to require the termination of Telpak. Although those decisions could scarcely have been predicted by AT&T when it prepared the economic study, the Commission did not permit AT&T an opportunity to demonstrate that the study's findings had continuing relevance, or to revise the study to conform to the changes. The Commission simply announced its new requirements in the Report and Order, and terminated the proceedings.

In these and other respects, the Commission failed to provide a reasoned basis for essential provisions of its orders. The Commission purported to balance the advantages and costs of its new requirements, but failed to make any meaningful effort to determine the actual significance and extent either of the costs or of the asserted advantages. (R. & O. at paras. 49, 88) (App. at 64-65, 83.) Its orders are nothing but an empty "recital of conclusions, not facts, and of conclusions with little supporting rationale visible." *Pillai v. CAB*, 485 F.2d 1018, 1027 (D.C. Cir. 1973).

The Commission's orders represent a radical departure from policies and requirements which have long prevailed in the telecommunications industry, and which the Commission itself has left undisturbed almost continuously since its creation.⁵⁹ It is rudimentary that in such situations a stringent "duty" is imposed upon administrative agencies to explain and justify their departure from "prior norms." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, *supra*, 412 U.S. at 808. The Commission has an important "obligation to make a record" to enable

⁵⁹ The sole exception to the Commission's previous consistent acquiescence in sharing restrictions is its first effort to compel unlimited sharing of Telpak—the effort that was set aside by this Court in *AT&T v. FCC*, *supra*, 449 F.2d 439.

courts to see why it decided as it did. *Home Box Office, Inc. v. FCC*, *supra*, slip opinion at 62. Unless that obligation is fully satisfied, reviewing courts cannot determine the basis for the agency's action or "judge the consistency of that action with the agency's mandate." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, *supra*, 412 U.S. at 808. See also *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954). This important duty cannot be satisfied, as the Commission has sought to do here, by a conclusory announcement of the agency's position; a "reasoned analysis" of the relevant factual and policy issues is instead essential. *Greater Boston Television Corp. v. FCC*, *supra*, 444 F.2d at 852. The Commission's failure here even to attempt such an analysis of the revenue and service consequences of its orders meant that it could not "give reasoned consideration to the ultimate issue presented—the balancing between the costs and benefits." *Public Service Commission v. FCC*, 511 F.2d 338, 349 (D.C. Cir. 1975).

B. The Commission's Orders Are Not Supported by Considerations of the Burden of Proof.

Perhaps in recognition of the absence of a rational basis for its orders, the Commission asserted that AT&T had failed to satisfy its burden of proof. (R. & O. at para. 42) (App. at 60.) The Commission's assertion is obviously without basis. First, Section 205,⁶⁰ as well as the Notice that instituted the proceeding,⁶¹ placed the burden of proof on those who claimed that the carriers' longstanding provisions regarding resale and sharing were unlawful.⁶²

⁶⁰ Under Section 205 of the Act, a tariff provision may be set aside only if, after full opportunity for a hearing regarding material issues of disputed fact, it is found that the tariff "... is or will be in violation of the provisions of this Act. . . ."

⁶¹ The Notice stated that any party that sought to challenge existing tariff provisions must "[f]ully justify any recommended tariff changes." (Notice, para. 31, item 10) (App. at 25.)

⁶² The applicable law is summarized in *Denegre v. La. Pub. Serv. Comm'n*, 242 So.2d 832, 836 (1970), where the Louisiana Supreme Court held that:

"... whenever anyone invokes the authority of the Commission to act, he must make a showing that the action requested is in the public interest or, at least, will not adversely affect the public interest."

Second, regardless of which party may be thought to have had the burden of proof, it is rudimentary that the Commission's decisions must be based upon substantial evidence in the record. As the Commission itself acknowledged in *Tariffs-Evidence*, 40 F.C.C. 2d 149 (1973),

"... irrespective of where the burden of proof lies, we must make our decision on the basis of reliable, probative and substantial evidence of record whether adduced by the carrier or other parties." *Id.* at 152.

In this instance, there is no "reliable, probative and substantial evidence of record" to support the Commission's new requirement of resale and sharing and the resulting prescription of practices and rates. The absence of such evidence requires that the Commission's orders be set aside.

IV.

A STAY OF THE COMMISSION'S ORDERS SHOULD BE ENTERED BEFORE TARIFFS IMPLEMENTING THOSE ORDERS BECOME EFFECTIVE ON JUNE 21, 1977.

AT&T and other carriers were required on March 23, 1977, to file revised tariffs in which they sought to conform to the Commission's orders. Under the Commission's current orders, the extensive tariffs filed by AT&T will go into effect, and AT&T will immediately be required to provide services to customers in accordance with the tariffs' provisions, on June 21, 1977. AT&T is already incurring administrative costs in connection with its efforts to prepare for implementation of the Commission's orders.

In light of the showing made above that the Commission's orders must be set aside, AT&T urges that a stay is now clearly appropriate. The orders involved here represent a novel experiment that will have far-reaching implications for numerous forms of telecommunications services. As a consequence of the orders' implementation, the structure of the industry will be radically altered. If the tariffs are permitted to remain in effect for any significant period while this Court considers the matter, AT&T will

suffer very substantial net reductions in revenues that will not be recoverable if the Commission's orders are ultimately set aside. In light of these and other significant irreparable losses and injuries, it would be both inequitable and contrary to the public interest to permit the Commission's orders to go into effect while this Court completes judicial review.⁶³ A stay should be granted now or, at a minimum, immediately following oral argument in these cases.

CONCLUSION

The Commission's orders under review here should be set aside and enjoined. A stay *pendente lite* should be entered to prevent the effectiveness of tariffs implementing the orders.

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⁶³ The irreparable losses and injuries threatened by the orders, together with the other bases for a stay, are more fully described in AT&T's motion to this Court and the supporting Healy affidavit that is attached to the motion. AT&T has not sought to reiterate all of the contentions and authorities described there, but requests that those materials be considered by the Court in connection with this matter.

